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In the
Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* KBR, INC. IN SUPPORT OF PETITIONER

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Amicus Curiae

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STATEMENT OF INTEREST[1]

Amicus KBR, Inc. is one of the world's preeminent engineering, procurement, construction, and services companies, employing approximately 27,000 people in more than 70 countries. KBR has a long history of delivering effective solutions to defense and government agencies worldwide. Many of the services KBR provides are indistinguishable from services traditionally performed by the government itself. For example, KBR provides government and military organizations with base operations, facilities management, border security, logistics support, humanitarian assistance, disaster response, and engineering, procurement, and construction services. KBR has completed projects and performed services for the U.S. Army and the U.S. Departments of Energy, State, and Homeland Security, among many other government entities.

KBR often provides those services under challenging circumstances in remote locations throughout the Middle East, Asia, and Africa. For example, in connection with a contract issued by the U.S. Army through the Logistics Civil Augmentation Program, KBR has provided numerous mission-critical services to support the Army's war efforts in Iraq and Afghanistan. In that role, KBR personnel

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

served in-theater alongside uniformed military personnel, and provided combat support services including, *inter alia*, transportation, waste management, food and water supply, building and equipment maintenance, and numerous other delegated functions. General John Vines, the former Commander of the Multi-National Corps–Iraq, has described KBR's services as "essential to the success of the military's combat mission." Appendix at 430, *Harris v. Kellogg Brown & Root Servs., Inc.*, No. 12-3204 (3d Cir. Oct. 12, 2012).

Because KBR routinely operates in difficult or challenging circumstances where injuries are all but inevitable, it has also faced litigation arising out of the services it provides to the government. For example, even though KBR was performing combat support services at the direction of the military in multiple active war zones—and even though the Army consistently gave KBR high ratings for its performance—KBR has been sued by numerous plaintiffs who seek to hold the company liable for alleged injuries incurred on foreign battlefields.

KBR has previously invoked the derivative sovereign immunity doctrine in response to many of these claims. Indeed, derivative sovereign immunity is one of KBR's core defenses in a massive, multi-district litigation challenging the company's operation of "burn pits" in Iraq and Afghanistan. *See In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 337-38 (4th Cir. 2014). KBR thus has a direct and substantial interest in ensuring that the Ninth Circuit's narrow and profoundly flawed interpretation of the derivative sovereign immunity doctrine is reversed.

KBR fully agrees with the arguments about derivative sovereign immunity advanced by Petitioner. *See* Pet. Br. 35-50. The company submits this *amicus* brief to provide additional background about the situations in which contractors perform delegated government functions, to discuss additional practical considerations that support a robust immunity doctrine, and to provide additional context about the proper legal standard for derivative sovereign immunity.

SUMMARY OF ARGUMENT

Since the Founding, federal, state, and local government entities have routinely turned to private individuals and companies to assist with the performance of public functions. Private contractors are able to offer specialized skills, knowledge, and expertise that may not be possessed by the permanent government workforce. Contractors also promote both flexibility and efficiency because they can be engaged on a project-by-project basis, thereby eliminating the need to hire and train additional full-time government employees.

Indeed, especially in the military context, the government now routinely delegates to private companies tasks that the armed forces once performed themselves. During the wars in Iraq and Afghanistan, the government relied extensively on private companies such as *amicus* KBR to provide numerous mission-critical combat support services that were performed by uniformed personnel during previous wars.

The derivative sovereign immunity doctrine provides a critical protection for individuals and

companies that perform delegated government functions. Sovereign immunity typically protects the government from suits for money damages when the government acts through full-time government employees. The derivative sovereign immunity doctrine bookends the government's own sovereign immunity by recognizing that the same protection should apply regardless of whether the government delegates a function to a private company or instead performs it in-house. Either way, the activity is still an *"act of the government," Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18, 21-22 (1940) (emphasis added), and should be entitled to the full range of immunity protections for such sovereign acts. In other words, immunity protections should turn on the *function* being performed rather than the *identity* of the person performing it.

For example, during the wars in Iraq and Afghanistan, Army personnel operated "burn pits" for waste disposal at many forward operating bases, but the Army delegated this task to KBR at certain other bases. It would be entirely illogical to have a rule in which the Army is immune from suit for its own burn pit operations, but KBR could face private claims for money damages for performing the *exact same functions* at a neighboring base pursuant to delegated contractual authority.

This Court has explained at length why it is critical to provide broad immunity for private companies and individuals who perform delegated government functions. Claims for money damages against a contractor can impair the paramount "interest in getting the government's work done" every

bit as much as claims directly against the government. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 505 (1988). If contractors are subject to liability for performing tasks within the scope of their delegated authority, then they may be forced to raise the price they charge for those services, or may refuse to offer such services to the government in the future. As a result, the government would be deprived of the skills and expertise that private companies and individuals are able to offer. And even if contractors were not deterred from working for the government, the threat of liability may lead to "unwarranted timidity in the performance of public duties." *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012). Broad immunity for those performing delegated government functions helps ensure that "those who serve the government do so 'with the decisiveness and the judgment required by the public good.'" *Id.*

Derivative sovereign immunity also has several advantages over other doctrinal alternatives for protecting those important interests. Rather than requiring courts to fashion federal common law defenses on an *ad hoc* basis, derivative sovereign immunity takes advantage of Congress' decisions about the circumstances in which sovereign immunity is waived. Recognition of derivative sovereign immunity does not automatically mean that a suit will be barred. But once derivative sovereign immunity is implicated, the burden properly shifts to the plaintiff to identify a waiver of sovereign immunity. The derivative sovereign immunity doctrine is thus straightforward to apply, and offers protection that is no broader than the government's own sovereign immunity for services it self-provides.

Several other practical considerations also counsel in favor of a robust immunity doctrine. In particular, the government itself already has a wide array of tools to ensure that its contractors are properly discharging their public functions in accordance with the contracts and all other applicable laws. Any private claims brought by third parties are thus superfluous at best, and would risk interfering with the government's ability to manage and oversee its contractors. Indeed, in this very case—and in many of the cases in which KBR is currently a defendant—the government *approved and accepted* the contractor's performance. Under those circumstances, it is absurd to allow third-party plaintiffs to challenge the contractor's actions (but not the government's) through private claims for money damages.

* * *

This Court need not break new ground to resolve this case, as *Yearsley* already articulates the proper standard for when derivative sovereign immunity should apply: if a contractor is acting pursuant to delegated authority "validly conferred" by the government, then "there is no liability" unless the contractor "exceeded his authority"—*i.e.*, acted outside the scope of the contract. 309 U.S. at 21-22. That is a workable and well-established standard that is closely related to the "scope of employment" test that applies in many other areas of the law. Under that standard, an action taken in good faith to discharge the contractor's delegated functions can be within the scope of the contract even if the plaintiff alleges that it was negligent or improper. *See, e.g., Aversa v.*

United States, 99 F.3d 1200, 1209-13 (1st Cir. 1996). In contrast, derivative sovereign immunity would not protect a contractor from liability for actions beyond the scope of the contract—*i.e.*, actions that are "different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." Restatement (Second) of Agency §228(2) (1958).

The Ninth Circuit's approach to derivative sovereign immunity in the decision below rests on an untenable interpretation of this Court's precedents and has little to recommend it. Rather than applying the clear rule this Court established in *Yearsley* and subsequent cases, the Ninth Circuit held—largely based on policy concerns about compensating plaintiffs—that *Yearsley* is inapplicable beyond the specific factual context in which it arose. That holding oversteps the boundaries of the proper role of a lower court. Lower courts must faithfully apply the *rules* and *principles* established by this Court, and not dismiss governing Supreme Court precedents as limited to the unique facts of those cases. This Court should reverse the judgment of the Ninth Circuit and reaffirm that private companies or individuals should not be left "holding the bag" for money damages when they perform delegated government functions for which the government itself would be immune from suit.

ARGUMENT

I. Contractors Such As KBR Provide A Wide Range Of Indispensable Support Services That The Government Would Otherwise Have To Perform Itself.

Federal, state, and local government entities have long relied on private individuals and companies to assist with the performance of public functions. Contractors such as *amici* routinely perform core government functions pursuant to delegated authority, including a broad array of distinctly sovereign tasks that the government once performed—and often continues to perform—itself.

That trend has been particularly pronounced in the military context. Before the advent of the modern, all-volunteer military, uniformed soldiers typically performed combat support functions such as maintaining facilities, transporting supplies, preparing meals, and performing countless other logistical and support tasks that are essential to the war effort. But with the transition to the modern, all-volunteer military—and the corresponding reduction in the size of the armed forces—it is now often impractical or infeasible for such tasks to be performed by uniformed soldiers.

Instead, the military has increasingly relied on in-theater service contractors to perform essential combat support functions. Thus, whereas meals in World War II may have been prepared by uniformed soldiers on "KP duty," today that function is routinely performed by a combat support contractor such as KBR. Using contractors in this manner allows for a more efficient allocation of scarce resources and frees

up uniformed personnel to focus on their core warfighting functions. According to the Department of Defense, "the U.S. would currently be unable to arm and field an effective fighting force" without "contractor support." Moshe Schwartz & Wendy Ginsberg, Cong. Research Serv., R41820, *Department of Defense Trends in Overseas Contract Obligations* i (2013).

Amicus KBR has been at the forefront of these developments, and has provided mission-critical "combat service support" to the Army in recent conflicts in the Balkans, Iraq, and Afghanistan (among others). *See supra* at 2 (Commander of the Multi-National Corps–Iraq describing KBR's services as "essential to the success of the military's combat mission"). The Army defines "combat service support" as the provision of "essential capabilities, functions, activities, and tasks necessary to sustain all elements of operating forces in theater at all levels of war."[2]

Pursuant to an umbrella contract with the Army, KBR has provided numerous combat support services for the war effort, including building maintenance, waste management, equipment repair, water treatment, food preparation, and laundry service. *See, e.g.*, *Aiello v. Kellogg Brown & Root Servs.*, 751 F. Supp. 2d 698, 700-02 (S.D.N.Y. 2011); *Taylor v. Kellogg Brown & Root Servs.*, 658 F.3d 402, 403-04, 406 (4th Cir. 2011); *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 337-38 (4th Cir. 2014); *Harris v. Kellogg Brown & Root Servs.*, 724 F.3d 458 (3d Cir. 2013).

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[2] U.S. Army Field Manual 1-02, Operational Terms and Graphics at 1-36 (2004).

For example, the Army routinely engaged KBR to operate "burn pits" for waste disposal at forward operating bases in Iraq and Afghanistan. Needless to say, there is no routine garbage service at a remote outpost in an active war zone. And, at many bases, it was too expensive or impractical to build trash incinerators. Senior Army officials—up to and including General David Petraeus—thus concluded that open-air "burn pits" were often the safest, most sanitary, and most efficient means of waste disposal. *See In re KBR Burn Pit Litig.*, 925 F. Supp. 2d 752 (D. Md. 2013). At some bases, Army personnel would operate the burn pit, while at other bases the Army would delegate that task to KBR (subject at all times to the Army's plenary supervision and control).

KBR and other contractors have also been responsible for transporting fuel, supplies, and personnel, providing base security, and providing interpretation and interrogation services. *See, e.g.*, *Carmichael v. Kellogg Brown & Root Servs.*, 572 F.3d 1271, 1275-78 (11th Cir. 2009); *McMahon v. Presidential Airways*, 502 F.3d 1331, 1336-37 (11th Cir. 2007); *Saleh v. Titan Corp.*, 580 F.3d 1, 2 (D.C. Cir. 2009). And KBR personnel played an integral role in restoring Iraq's oil infrastructure to promote that country's economic independence, which was a critical goal of both military and foreign policy officials. *See McManaway v. KBR, Inc.*, 554 Fed. Appx. 347, 348 (5th Cir. 2014) (Jones, J., dissenting from denial of rehearing *en banc*).

In short, KBR personnel served in-theater alongside and at the direction of uniformed military personnel, performing tasks that have historically

been done by the military. And, unfortunately, like uniformed military personnel, KBR personnel were frequently the targets of enemy attacks. A number of KBR personnel were injured or killed in the line of duty while supporting the Army's mission in Iraq and Afghanistan. It is not an overstatement to say that KBR has served on the front lines in the War on Terror, the Iraq War, and many other global conflicts.

II. The Derivative Sovereign Immunity Doctrine Is A Critical Protection For Contractors That Perform Delegated Government Functions.

A. The Government Is Typically Immune From Suit for Money Damages for Services It Self-Provides.

Virtually all of the contracted services discussed above are functions that the government previously performed itself and, indeed, often continues to perform itself. The Army may use a convoy of trucks driven by soldiers to supply food, water, and fuel to a remote outpost in Iraq, or it may engage a contractor such as KBR to do the same. At some forward operating bases, Army personnel would operate the burn pit for waste disposal, while at other bases the Army delegated that function to KBR. And, even outside of combat situations, the Army may handle critical support tasks (such as recruiting) in-house, or it may delegate those functions to a contractor such as Petitioner Campbell-Ewald.

When the government performs these services itself, there is no question that it would be protected by sovereign immunity from private claims for money damages. The Federal Tort Claims Act provides a

general waiver of the United States' sovereign immunity, subject to a number of broad exceptions, including: claims based on "the exercise or performance or the failure to exercise or perform a discretionary function"; claims "arising out of the combatant activities of the military ... during time of war"; and "[a]ny claim arising in a foreign country." 28 U.S.C. §2680(a), (j), (k). And this Court has long held that the government is immune from private claims under federal law unless Congress has *clearly* indicated that such suits should be allowed. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Filarsky*, 132 S. Ct. at 1665.

A claim by a private plaintiff challenging the Army's operation of a fuel convoy or burn pit in Iraq would likely fall within several different FTCA exceptions, and would thus be barred by sovereign immunity. Unsurprisingly, few plaintiffs have even attempted to sue the government directly for money damages for alleged injuries arising out of the war effort.

B. This Court Has Repeatedly Recognized the Importance of Broad Immunity for Those Who Perform Delegated Government Functions.

The derivative sovereign immunity doctrine is a critical bookend to the government's own sovereign immunity, as it prevents plaintiffs from doing indirectly what they cannot do directly. If the activity in question involves a *government function*, it should not matter in the slightest whether the government performs that activity itself or instead engages a private company or individual to handle it on the

government's behalf. Either way, the activity is still an act of the government, and should be entitled to the full range of immunity protections for such sovereign acts.

This Court has repeatedly acknowledged this basic principle. Although the Court's decisions have arisen in a variety of factual and legal contexts, the Court has made crystal clear that private contractors should not be left "holding the bag" for money damages when they perform delegated government functions for which the government would be immune if sued directly.

1. In *Yearsley*, a private company, acting pursuant to a contract with the Army Corps of Engineers, built dikes that caused erosion of the plaintiffs' land. 309 U.S. at 19. The plaintiffs sought to recover money damages from the contractor for that injury, but this Court unanimously rejected the plaintiffs' claims. As the Court explained, "if [the] authority to carry out the project was validly conferred, that is if what was done was within the constitutional power of Congress, *there is no liability on the part of the contractor for executing its will*." *Id.* at 20-21 (emphasis added).

The Court identified only two narrow circumstances in which it would be appropriate to hold a contractor liable for actions taken pursuant to a government contract: if the contractor "exceeded his authority," or if that authority "was not validly conferred" in the first place. *Id.* at 21. In contrast, when a company *is* acting within the scope of its authority pursuant to a valid contract with the United States, its actions effectively amount to "act[s] of the

government," and any tort claims challenging those actions are barred by derivative sovereign immunity. *Id.* at 21-22.

This Court further emphasized the importance of robust protection for government contractors in *Boyle v. United Technologies*, 487 U.S. 500 (1988). Although *Boyle* involved preemption of state-law claims against contractors, rather than derivative sovereign immunity, much of this Court's reasoning fully supports a broad doctrine of derivative sovereign immunity. Indeed, the Court cited and relied upon *Yearsley*'s reasoning in crafting the preemption framework that it adopted in *Boyle*. *See id.* at 505-06 (discussing *Yearsley* and noting that the federal interest in providing immunity to contractors who perform government functions "surely exists as much in procurement contracts as in performance contracts"). And the United States recognized just last Term that "the principle of derivative sovereign immunity informs the preemption analysis." Br. for United States as Amicus Curiae at 18-19, *KBR, Inc. v. Metzgar*, No. 13-1241, 2014 WL 7185601 (U.S. Dec. 16, 2014) ("U.S. *Metzgar* Br."). Whether the doctrine is framed in terms of preemption or derivative sovereign immunity, there is no question that it would be "detrimental to military effectiveness" if "contractors that the U.S. military employs during hostilities are subject to the laws of fifty different states for actions taken within the scope of their contractual relationship supporting the military's combat operations." *Id.* at 21.

In *Boyle*, this Court emphasized that claims against private contractors can impair the paramount

"interest in getting the Government's work done," every bit as much as claims directly against the government. 487 U.S. at 505. Plaintiffs suing contractors often claim that they are merely seeking a remedy for a *private* wrong, but this Court emphatically disagreed. As the Court explained, "[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts," because "either the contractor will decline to manufacture the design specified by the Government, or it will raise its price." *Id.* at 507. Either way "the interests of the United States will be directly affected." *Id.*

The Court also discussed at length the problems that would result if plaintiffs could bring suits against contractors that would be barred by sovereign immunity if brought directly against the government. In many cases, "[t]he financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability." *Id.* at 511-12. In short, "[i]t makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." *Id.* at 512.

2. The Court addressed these issues again most recently in *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012). That case specifically addressed the scope of the qualified immunity defense to a claim under 42 U.S.C. §1983, but the Court's analysis drew upon the

same principles that underlie the derivative sovereign immunity doctrine. *See* 132 S. Ct. at 1660. Indeed, *Filarsky* is particularly illuminating because it makes clear that immunity defenses must turn on the *function* being performed rather than the *identity* of the person performing that function.

The plaintiff in *Filarsky*—a firefighter who was being investigated for abusing his sick leave—brought claims against a number of individuals involved in the investigation, including a private lawyer who had been hired by the city to assist with the investigation. *Id.* at 1660-61. The Ninth Circuit had held that this lawyer could not claim the protection of qualified immunity because he was "a private attorney and not a City employee," *id.* at 1661, but this Court unanimously rejected that narrow interpretation of the immunity doctrine.

As the Court explained, "[a]t common law, those who carried out the work of government enjoyed various protections from liability when doing so, in order to allow them to serve the government without undue fear of personal exposure." *Id.* at 1660. When the immunity doctrines were developed in the nineteenth century, governments "operated primarily at the local level," and [l]ocal governments ... generally had neither the need nor the ability to maintain an established bureaucracy staffed by professionals." *Id.* at 1662. Instead, governments were to a significant extent "administered by members of society who temporarily or occasionally discharge[d] public functions." *Id.* Private citizens were "actively involved in government work, especially where the work most directly touched the lives of the people." *Id.*

at 1663. Among many other roles, private citizens routinely served as postmen, wharfmasters, prosecutors, judges, sheriffs, and constables. *Id.* at 1663-64.

In light of the broad array of public functions that private citizens often performed, "it should come as no surprise that the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities." *Id.* at 1663. The protections provided by the common law simply "did not turn on whether someone ... worked for the government full-time or instead for both public and private employers." *Id.* at 1664. And "examples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself." *Id.* at 1665.

The Court also explained at length why it was critical to have broad immunity for those *performing government functions*, regardless of whether those functions were performed by government employees or private citizens. Quite simply, immunity from suit "protect[s] government's ability to perform its traditional functions." *Id.* at 1665. It does so by "helping to avoid 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits." *Id.* Ensuring that "those who serve the government do so 'with the decisiveness and the judgment required by the public good' ... is of vital

importance regardless whether the individual sued as a state actor works full-time or on some other basis." *Id.*

The Court further noted that unwarranted disparities would exist if full-time government employees were protected by immunity but those acting pursuant to delegated authority were not. Private individuals routinely "work in close coordination with public employees, and face threatened legal action for the same conduct." *Id.* at 1666. Because government employees "will often be protected from suit by some form of immunity," contract employees working alongside them "could be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Id.* And that liability risk would, in turn, hinder the government's ability to "secure the services of private individuals" who may possess "specialized knowledge or expertise." *Id.* at 1665-66.

* * *

At bottom, *Yearsley*, *Boyle*, and *Filarsky* all recognize the basic reality that it is essential for the government to be able to work through private companies or individuals who can offer unique expertise or capabilities. But the fact that the government is operating through a private contractor does not change the fact that a *government function* is still being performed. "[T]he same policy considerations that justify immunity for government employees can apply with equal force to private actors when they are charged with implementing government policies." *Murray v. Northrop Grumman*

Info. Tech., Inc., 444 F.3d 169, 174-75 (2d Cir. 2006). Thus, if the government's sovereign immunity "protects a particular governmental function," it is a "small step to protect that function when delegated to private contractors." *Mangold v. Analytic Servs.*, 77 F.3d 1442, 1447-48 (4th Cir. 1996).

Indeed, although derivative sovereign immunity serves the same underlying interests as the preemption doctrine applied in *Boyle*, it has significant advantages over the doctrinal alternatives. Rather than force courts to fashion the doctrine on an *ad hoc* basis, derivative sovereign immunity allows courts to rely on the decisions Congress has made in waiving sovereign immunity and fashioning exceptions to the waiver. Recognizing a robust derivative sovereign immunity doctrine does not automatically mean that a suit against a contractor will be barred. But it does place the burden on the plaintiff to identify a waiver of sovereign immunity, which in turn requires consideration of Congress' judgments in waiving sovereign immunity for certain torts subject to certain exceptions. That result not only makes policy sense, but focuses the analysis where it properly belongs—namely, on the types of sovereign functions for which the government would be immune from suit if it performed those tasks itself.

C. Claims Against Contractors Performing Delegated Functions Are Superfluous in Light of the Government's Plenary Authority to Oversee Its Contractors.

In addition to the compelling reasons for a robust immunity doctrine set forth in *Yearsley*, *Boyle*, and *Filarsky*, several other practical considerations also

counsel in favor of broad immunity for individuals and companies that perform delegated government functions. In particular, it is critical to keep in mind that *the government itself* has plenary authority to oversee and regulate its contractors' actions, and to take steps to remedy any alleged deficiencies in a contractor's performance. Thus, any private suits for money damages against a contractor would not only be superfluous, but would also interfere with the government's ability to manage its contractors and delegate functions as it deems appropriate.

The government has numerous tools at its disposal to ensure that contractors are properly performing their delegated functions in compliance with the terms of the contract and all relevant laws. Most obviously, if a contractor does not meet the contract's specifications or acts in violation of the law, the government can assert a breach of the contract or can seek to terminate it. For example, the U.S. Agency for International Development recently suspended two contractors for unsatisfactory work on housing projects in Haiti.[3] And, more prominently, following the disastrous launch of Healthcare.gov, the government ended its contract with the primary outside vendor for that site.[4] The government has both the tools and the incentives to ensure that its

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[3] *Second USAID Contractor Suspended Following Caracol Housing Debacle*, Ctr. for Econ. and Policy Research Blog, (Mar. 30, 2015), http://perma.cc/3nae-jvph.

[4] *See* Juliet Eilperin & Amy Goldstein, *Obama administration to end contract with CGI Federal, company behind HealthCare.gov*, Washington Post, Jan. 10, 2014.

contractors are following the terms of the contract and all other applicable laws.

Moreover, a contractor that performs poorly or fails to comply with the law may be shut out of future government contracts. Government agencies have inherent authority to use "suspension and debarment" procedures to prevent contractors from bidding on government work for a specified period of time if they have engaged in various forms of misconduct. *See, e.g.*, *Gonzalez v. Freeman*, 334 F.2d 570, 576-77 (D.C. Cir. 1964). Suspension or debarment can be ordered for serious misconduct such as fraud or a criminal conviction, but can also be imposed for any other "compelling" reason that casts doubt on the contractor's "present responsibility."[5] For example, contractors have been suspended or debarred for: violating the Clean Air Act or Clean Water Act; failing to comply with drug-testing or affirmative action requirements for employees; and failing to comply with certain immigration and labor requirements. *Id.* The federal government has sharply increased its use of suspensions and debarments in recent years.[6]

Given all of these built-in checks on contractors' conduct and performance, private remedies are

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[5] *See generally* Kate M. Manuel, Cong. Research Serv., RL34753, *Debarment and Suspension of Government Contractors: An Overview of the Law, Including Recently Enacted and Proposed Amendments*, (2012), http://1.usa.gov/1L34YDU.

[6] In FY2014, federal agencies and departments reported 5,179 suspensions, proposed debarments, and debarments, an 8% increase over FY2013 and a three-fold increase since FY2009. Neil Gordon, *Suspension and Debarment by the Numbers*, Project on Gov't Oversight (Apr. 24, 2015), http://perma.cc/ef4h-bfu2.

unnecessary at best, and would often prove counterproductive. Indeed, it would be especially absurd to allow private, third-party plaintiffs to sue a contractor for money damages based on its performance of otherwise-immune government functions where the government itself has approved and accepted the contractor's performance. For example, the Army consistently rated KBR's work in Iraq and Afghanistan as "Good," "Very Good," or "Excellent," and even awarded the company significant "award fees" for its performance.[7] Yet a number of private plaintiffs have nonetheless sought to challenge KBR's performance of those very same contractual duties. Here, too, Respondent seeks money damages from Campbell-Ewald even though the Navy reviewed and approved the text messages in question. *See* Pet. Br. 4-6.

Under these circumstances, a suit against KBR or Campbell-Ewald is no different in practice from a suit *directly against the government* that seeks to second-guess its delegation of authority. The derivative sovereign immunity doctrine helps ensure that the government—rather than private plaintiffs—has the ultimately responsibility to oversee its contractors, and that those contractors are not held liable for what the government considers a job well done.

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[7] *See, e.g.*, Press Release, KBR Receives LogCAP III Award Fee (May 12, 2010), http://perma.cc/N6DE-KDU9.

III. Derivative Sovereign Immunity Should Protect Contractors From Liability For Claims Arising Out Of Delegated Government Functions Within The Scope Of Their Contractual Authority.

A. The Ninth Circuit's Narrow Interpretation of the Derivative Sovereign Immunity Doctrine Is Wholly Without Merit.

The Ninth Circuit's narrow and wooden interpretation of the derivative sovereign immunity doctrine in the decision below does not withstand scrutiny. *See* Pet. Br. 35-50.

Because *Yearsley* involved claims for property damage arising out of a public works project, the Ninth Circuit held that the derivative sovereign immunity doctrine is similarly limited to "claims arising out of property damage caused by public works projects." Pet.App.15a. Applying that logic, the Ninth Circuit would presumably hold that *Marbury v. Madison*, 5 U.S. 137 (1803), is limited to cases involving the delivery of commissions, and *Gibbons v. Ogden*, 22 U.S. 1 (1824), is limited to cases involving steamboat monopolies. This is obviously not the proper way for a lower court to apply Supreme Court precedent. It is the duty of a lower court to apply the *rules* and *principles* established by this Court in the relevant precedents, not to mechanically limit this Court's decisions to the factual contexts in which they arose.

In all events, the Ninth Circuit's attempt to limit *Yearsley* to its facts fails. The Ninth Circuit did not even attempt to explain why derivative sovereign

immunity should apply in cases involving "property damage caused by public works projects," but should not apply in cases involving personal injuries (such as alleged injuries from a burn pit in Iraq) or other alleged harms (such as receiving an unwanted text message). *Yearsley* very explicitly states that there are only two circumstances in which a contractor performing a delegated government function should be held liable to a third party for money damages: where the contractor "exceeded his authority," or where that authority "was not validly conferred" by the government. 309 U.S. at 21. This Court did not remotely suggest that this was a special protection that applied only to public-works contractors sued for damaging someone's property.

The Ninth Circuit also asserted that this Court's holding in *Yearsley* turned the availability of an "alternate remedy" for the plaintiffs (via a takings claim against the government). Pet.App.15a-16a. But, once again, nothing in this Court's decision establishes that limitation. To the contrary, the Court made crystal clear that "if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, *there is no liability on the part of the contractor for executing its will.*" *Yearsley*, 309 U.S. at 20-21 (emphasis added). The fact that the plaintiff in *Yearsley* was able to pursue a takings claim against the government might have made that a particularly easy case, but it was by no means essential to this Court's holding. Sovereign immunity, whether derivative or direct, usually leaves a plaintiff without a remedy. Congress is well aware of that, which is

why it has waived sovereign immunity in some circumstances but not others.

Other courts have correctly recognized that the availability of an alternative remedy for money damages is not a *sine qua non* for application of derivative sovereign immunity under *Yearsley* (or any other sovereign immunity doctrine, for that matter). For example, in *Ackerson v. Bean Dredging*, 589 F.3d 196, 202-03 (5th Cir. 2009), the plaintiffs brought claims for "negligence, breach of implied warranty, concealment, and violation of environmental-protection laws," alleging that a group of dredging contractors took actions that amplified the environmental damage caused by Hurricane Katrina. There was no suggestion whatsoever that the plaintiffs could have brought those state-law claims against the government in a different forum, yet that posed no bar to the Fifth Circuit's application of derivative sovereign immunity. *See id.* at 204 ("We agree with the district court's ruling that ... the Contractor Defendants are entitled to government-contractor immunity under *Yearsley*.").

The Ninth Circuit also expressed policy-based concerns that application of the derivative sovereign immunity doctrine would prevent contractors from being "held accountable for their wrongful conduct." Pet.App.20a. But, as noted above, the government always retains authority to monitor and supervise its contractors and hold them "accountable" for any shortcomings in their performance. *See supra* at 19-22. Here, for example, if the Navy believed that Campbell-Ewald was violating the terms of its contract or the TCPA, it could have instructed the

company to cease any improper practice. And, if the company persisted despite that warning, the government could have sought to terminate the contract or could have selected a different company to handle its recruiting services when the contract was up for renewal. It makes no sense at all to allow private plaintiffs to challenge Campbell-Ewald's actions under the contract given that the Navy closely monitored the company's conduct and approved its performance.

Finally, the Ninth Circuit suggested that the derivative sovereign immunity doctrine should be applied narrowly and "with the utmost care" because it will result in plaintiffs being "denied compensation." Pet.App.20a. But that clear statement rule gets matters exactly backwards. After all, "den[ying] compensation" is just the obverse of "protecting the fisc," which is the *raison d'etre* of any immunity doctrine. Indeed, with respect to sovereign immunity, this Court applies a strong presumption that there has *not* been a waiver or abrogation of the government's immunity absent a clear indication to the contrary. *See, e.g.*, *Price v. United States*, 174 U.S. 373, 375-76 (1899) (it is an "axiom of our jurisprudence" that "[t]he government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it"); *Sossamon v. Texas*, 131 S. Ct. 1651, 1657-58 (2011) (no waiver of state sovereign immunity absent a "clear" or "unequivocal" waiver). The Court has long applied this clear-statement rule even though the result will be to "deny compensation" to many plaintiffs who seek to sue the government for money damages.

In all events, the Ninth Circuit's concerns about an overly broad derivative sovereign immunity doctrine are misplaced. Only where Congress has determined that there should not be a waiver of the government's own sovereign immunity will derivative sovereign immunity apply. And, even then, there may still be alternative remedies available to plaintiffs who are actually injured. For example, as the United States has explained, even if derivative sovereign immunity would bar private suits for money damages against battlefield support contractors such as KBR, "other legal avenues for obtaining compensation are available" for service members or other personnel injured in the line of duty. U.S. *Metzgar* Br. at 17-18.[8] Thus, even though derivative sovereign immunity does not turn on the availability of an alternative form of compensation, the absence of a private claim for money damages against a contractor hardly suggests that legitimately injured individuals will be left with no remedy whatsoever.

B. The Proper Test Should Provide That Contractors Are Immune From Suit for Actions Taken Within the Scope of a Validly-Issued Contract.

The Court need not break new ground to resolve this case because the proper test for derivative sovereign immunity is already set forth in *Yearsley*:

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[8] In particular, the Department of Veterans Affairs provides compensation for soldiers "[f]or disability resulting from personal injury suffered ... in [the] line of duty." 38 U.S.C. §§1110, 1131. And the Defense Base Act, 42 U.S.C. §1651, establishes a federal workers' compensation system for employees injured or killed while working under a government contract.

when a contractor is performing delegated government functions pursuant to a validly issued contract, there can be no liability unless the contractor "exceeded his authority"—*i.e.*, acted outside the scope of the contract. 309 U.S. at 21.[9] That rule is eminently reasonable. If a contractor is performing delegated tasks within the scope of the contract, then those tasks are effectively government functions *in their own right* and should be protected by the same immunities as if they were performed by full-time government employees. *See Yearsley*, 309 U.S. at 21-22 (actions taken pursuant to a valid contract are "act[s] of the government").

Whether a certain action was taken within the scope of a contract is also a workable and well-established legal standard. Indeed, it is essentially identical to the inquiry under the Westfall Act that is used to determine when federal employees are immune from suit. That statute precludes any civil action against a federal employee for "injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government *while*

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[9] The United States has advanced a similar test for preemption of state-law tort claims against battlefield support contractors, to ensure that "contractors performing essential tasks in an active theater of war" are not "subject to the laws of fifty different states." U.S. *Metzgar* Br. at 7. The United States argued that state-law claims against a contractor should be found preempted if: (1) the claim would have been barred by sovereign immunity if brought directly against the government; and (2) the contractor was "acting within the scope of its contractual relationship with the federal government at the time of the incident out of which the claim arose." *Id.* at 15-16.

acting within the scope of his office or employment." 28 U.S.C. §2679(b)(1) (emphasis added). The scope-of-employment inquiry is also informed by common law principles of respondeat superior, which address when a principal should be held liable for the acts of an agent. *See Jamison v. Wiley*, 14 F.3d 222, 227 n.2 (4th Cir. 1994) (Westfall Act immunity evaluated "by reference to the respondeat superior law of the state in which the conduct occurred").

Critically, an action can be within the *scope* of a government contract even if the plaintiff alleges that it was negligent or improper. *See, e.g., United States v. Smith*, 499 U.S. 160 (1991) (alleged medical malpractice by Army physician occurred within the scope of employment); *Aversa v. United States*, 99 F.3d 1200, 1209-13 (1st Cir. 1996) (allegedly slanderous press release was within the scope of employment for IRS agent even though it was "contrary to his employer's policies and rules"); *Coyne v. United States*, 233 F. Supp. 2d 135, 140-42 (D. Mass. 2002) (FBI agent's accidental disclosure of identity of confidential informant was within the scope of employment).[10] Courts have generally found an action to be within the scope of employment if it was "authorized by the employer or incidental to authorized duties; if it was

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[10] Contracts that involve dangerous, uncertain, or quickly-evolving situations may include a promise by the government to indemnify the contractor for any litigation or civil liability arising out of the agreement, "whether or not caused by the negligence of the Contractor or of the Contractor's agents, servants, or employees." 48 C.F.R. §52.228-7. The fact that allegedly negligent conduct may be covered by an indemnification clause only underscores that such conduct still falls within the scope of the contract.

done within the time and space limits of the employment; and if it was actuated at least in part by a purpose to serve an objective of the employer." *Aversa*, 99 F.3d at 1210.[11]

In contrast, derivative sovereign immunity would not protect a contractor from liability if its action was beyond the scope of the contract—*i.e.*, if it was "different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." Restatement (Second) of Agency §228(2) (1958); *see also Etherage v. West*, 587 Fed. Appx. 390, 391 (9th Cir. 2014) (applying Restatement test). Derivative sovereign immunity thus would not apply if, for example, a contractor employee took a vehicle on a joyride or committed sexual assault while stationed on a military base. But when a contractor performs services in a good-faith effort to discharge its contractual duties—as Petitioner did here, *see* Pet. Br. 43-50, and as KBR unquestionably did while supporting the Army's mission in Iraq and Afghanistan—it should retain the full panoply of protections for those performing delegated government functions.

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[11] Unlike the Ninth Circuit, the Fourth Circuit has correctly recognized that *Yearsley* is not limited to property damage claims arising out of public works contracts. *See In re KBR*, 744 F.3d at 342-44. But the Fourth Circuit has nonetheless held that a contractor is not entitled to the protection of that doctrine unless it has *fully complied* with all aspects of the contract. *See id.* at 345 (derivative sovereign immunity applies only if the contractor "acted in conformity with" its contract). As the cases cited above make clear, that is an overly narrow interpretation of the "scope of the contract" standard.

CONCLUSION

For the foregoing reasons, this Court should reverse the Ninth Circuit's profoundly flawed interpretation of the derivative sovereign immunity doctrine.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Amicus Curiae

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